(8) (6)

Nos. 04-1244, 04-1352

Supreme Court, U.S.
FILED
AUG 26 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOSEPH SCHEIDLER, *et al.*,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,

Respondents.

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF *AMICUS CURIAE* AMERICANS UNITED FOR LIFE IN SUPPORT OF PETITIONERS

CLARKE D. FORSYTHE
(*Counsel of Record*)
DENISE M. BURKE
MAILEE R. SMITH
AMERICANS UNITED FOR LIFE
310 South Peoria Street,
Suite 300
Chicago, Illinois 60607
312/492-7234

G. ROBERT BLAKEY
O'Neill Professor of Law
NOTRE DAME LAW SCHOOL*
326 Law School
P.O. Box R
Notre Dame, Indiana 46556
574/631-5717

Counsel for Amicus Curiae

August 26, 2005

*Noted for purpose of identification only.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. The duty of the Seventh Circuit to enforce the mandate of the Supreme Court is clear	4
II. The Seventh Circuit failed to abide by the letter and spirit of this Court's mandate in *NOW II*	8
CONCLUSION	14

TABLE OF AUTHORITIES

Page

CASES

Agostini v. Felton, 521 U.S. 203 (1997) 7

Amoco Prod. Co. v. Vill. of Gambel, 480 U.S. 531 (1987) 11

Bethea v. Levi Strauss & Co., 916 F.2d 453 (8th Cir. 1990) 5

Briggs v. Penn. R.R. Co., 334 U.S. 304 (1948) 4

Casey v. Planned Parenthood, 14 F.3d 848 (3rd Cir. 1994) 5, 6

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800 (1988) 4, 6

Eastern Cherokees v. United States, 225 U.S. 572 (1912) 5

Estate of Centennial Communications, Inc. v. Vogelei, 2005 U.S. App. LEXIS 9051 (9th Cir. May 18, 2005) 5

Estate of Leonard E. Whitlock v. Comm'r of Internal Revenue, 547 F.2d 506 (10th Cir. 1976) 5

FCC v. Pottsville Broad. Co., 309 U.S. 134 (1940) 5

Gertz v. Robert Welch, Inc., 680 F.2d 527 (7th Cir. 1982) 7

Hartford Accident & Indem. Co. v. Gulf Ins. Co., 837 F.2d 767 (7th Cir. 1988) 5

In re Sanford Fork & Tool Co., 160 U.S. 247 (1895) ..... *passim*

Kerman v. City of New York, 374 F.3d 93 (2nd Cir. 2004) 5

Moore v. Anderson, 222 F.3d 280 (7th Cir. 2000) 7

TABLE OF AUTHORITIES – Continued

Page

Nat'l Org. for Women, Inc. v. Scheidler, 1999 U.S. Dist. LEXIS 11980 (N.D. Ill. July 28, 1999) 3, 10

Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 1215 (1994) 1

Nat'l Org. for Women, Inc. v. Scheidler, 267 F.3d 687 (7th Cir. 2001) 3, 10

Nat'l Org. for Women, Inc. v. Scheidler, 2004 U.S. App. LEXIS 4020 (7th Cir. Feb. 26, 2004) 3, 11

Nat'l Org. for Women, Inc. v. Scheidler, 396 F.3d 807 (7th Cir. 2005) 3, 8, 11, 12

Pastore v. Structure Guard Inc., 2003 U.S. App. LEXIS 2352 (Fed. Cir. Feb. 5, 2003) 5

Quern v. Jordan, 440 U.S. 332 (1979) 2, 5, 6

Rogers v. Hill, 289 U.S. 582 (1933) 6, 9

Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393 (2003) ..... *passim*

Sibbald v. United States, 37 U.S. 488 (1838) 5

Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939) ... 2, 4, 5

Tollett v. City of Kemah, 285 F.3d 357 (5th Cir. 2002) 5, 6

United States v. Belculfine, 527 F.2d 941 (1st Cir. 1975) 5

United States v. Camou, 184 U.S. 572 (1902) 6

United States v. Kellington, 217 F.3d 1084 (9th Cir. 2000) 5, 6

United States v. King, 1995 U.S. App. LEXIS 28820 (4th Cir. Oct. 16, 1995) 5

TABLE OF AUTHORITIES – Continued

Page

United States v. LaSalle, 1992 U.S. App. LEXIS 32089 (6th Cir. Nov. 24, 1992) 5

United States v. White, 406 F.3d 827 (7th Cir. 2005) 7

Univ. of Tex. v. Camenisch, 451 U.S. 390 (1981) 11

Vendo Co. v. Lektro-Vend Corp., 434 U.S. 425 (1978) 5, 7

Venn v. St. Paul Fire & Marine Ins. Co., 99 F.3d 1058 (11th Cir. 1996) 5

Vidimos, Inc. v. Wysong Laser Co., Inc., 179 F.3d 1063 (7th Cir. 1999) 2, 7, 13

OTHER AUTHORITIES

Merits Brief of Respondents, *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393 (2003) 12

Petitioner's Reply to Brief in Opp., *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393 (2003) 12

Respondents' Brief in Opp. to Petition for Writ, *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393 (2003) 12

INTEREST OF AMICUS[1]

Americans United for Life (AUL) is a national, non-profit public interest legal and educational organization that advocates, among other things, that the practice of human abortion harms the physical and social well-being of women, ends the lives of the unborn children, and contradicts the highest moral standards of American life. While working primarily in the courts, legislatures, and outlets of public education and media, AUL believes that free, open, and robust public social debate on the issue of abortion must be allowed unimpeded by fear of meritless and costly litigation and the threat of draconian damage awards.

Respondents have been working for nearly twenty years to stifle public opposition to abortion by enjoining free and vigorous protest. If the Court upholds the Seventh Circuit's deviation from this Court's clear mandate which reversed the lower court and injunction, it will not only encourage the stifling of First Amendment rights, but it will also set a disastrous precedent that other Circuits are sure to follow. Both parties and courts will begin speculating whether the Court really means what it says. This will encourage lower federal and state courts to ignore the Supreme Court's decisions, resulting in an unstable judicial system.

---

[1] The parties have agreed to consent to all *amici* who wish to file in this case. Letters to that effect are on file with the Court. Attorneys from Americans United for Life (AUL) previously represented the Petitioners in this litigation. *See Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 1215 (1994). No current counsel for a party authored this brief in whole or in part. No entities other than the *Amicus* or its counsel have made a monetary contribution to the preparation or submission of this Brief.

In addition, AUL's efforts to promote public policy that defends human life by impacting the broader culture will be, at the very least, indirectly and adversely affected. Consequently, AUL files this amicus brief in support of Petitioners, urging that the lower court's decision be summarily reversed.

SUMMARY OF ARGUMENT

Based upon the law of the case doctrine and the mandate rule, the Seventh Circuit has a duty to execute and enforce the Supreme Court's mandates. *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939); *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895). Lower courts cannot vary from, review, or intermeddle with this Court's mandates; instead, the lower courts are to act consistently with the letter and spirit of the Court's mandates. *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979); *Sanford*, 160 U.S. at 255. Even the Seventh Circuit itself has stated that arguments not based upon intervening authority, new evidence, or other changed circumstances are barred by the law of the case doctrine. *Vidimos, Inc. v. Wysong Laser Co., Inc.*, 179 F.3d 1063, 1065 (7th Cir. 1999). In addition, considerations of fact or law that were available when a previous appeal was heard are also barred. *Id.*

In its decision below, the Seventh Circuit failed to abide by the letter and spirit of this Court's mandate by indicating that four predicate acts remain that may justify an injunction. Yet the Court's unequivocal language in *Scheidler v. National Organization for Women, Inc.* [hereinafter "NOW II"] stated that all of the predicate acts alleged of Petitioners must be reversed and that the

injunction imposed against Petitioners must be vacated. 537 U.S. 393, 411 (2003).[2] In addition, the spirit of the mandate also demonstrates that the Supreme Court ruled upon and had before it every predicate act alleged of Petitioners – including the four predicate acts now alleged by Respondents. As such, the Seventh Circuit has deviated from this Court's clear mandate, and the decision of the lower court should be summarily reversed.

ARGUMENT

Respondents initiated this case nearly twenty years ago, and the case has already been before the Supreme Court on two previous occasions. Yet despite the fact that the Court ruled in 2003 that the nationwide injunction entered against Petitioners *must* be *vacated*, this case is once again before the Court. In its *Denial of Rehearing* on remand, the Seventh Circuit made two conclusions: 1) that this Court did not rule on the question of whether four predicate acts involving acts or threats of physical violence[3] could support a more narrow injunction, and 2) that this Court did not even have before it those four predicate acts. *Denial of Rehearing*, 396 F.3d at 811. Based upon the

[2] For ease of reference, the following additional decisions, listed in chronological order, will be referenced and cited by the caption noted: *Nat'l Org. for Women, Inc. v. Scheidler*, 1999 U.S. Dist. LEXIS 11980 (N.D. Ill. July 28, 1999) [hereinafter "*District Court Order*"]; *Nat'l Org. for Women, Inc. v. Scheidler*, 267 F.3d 687 (7th Cir. 2001) [hereinafter "*Decision Affirming Judgment*"]; *Nat'l Org. for Women, Inc. v. Scheidler*, 2004 U.S. App. LEXIS 4020 (7th Cir. Feb. 26, 2004) [hereinafter "*Initial Order on Remand*"]; *Nat'l Org. for Women, Inc. v. Scheidler*, 396 F.3d 807 (7th Cir. 2005) [hereinafter "*Denial of Rehearing*"].

[3] Hereinafter "four predicate acts."

law of the case doctrine and the mandate rule, the Seventh Circuit deviated from this Court's mandate in *NOW II*.

I. THE DUTY OF THE SEVENTH CIRCUIT TO ENFORCE THE MANDATE OF THE SUPREME COURT IS CLEAR

According to the "law of the case" doctrine, once a court decides upon a rule of law, that decision governs the same issues in subsequent stages of the same case. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1988). A corollary of this doctrine is the mandate rule, which holds that a lower court is "bound to carry the mandate of the upper court into execution and [cannot] consider the questions which the mandate laid at rest." *Sprague*, 307 U.S. at 168.

Even in its "earliest days," this Court consistently held that a lower court has no authority to deviate from the mandate issued by an appellate court. *Briggs v. Penn. R.R. Co.*, 334 U.S. 304, 306 (1948). Indeed, in 1895 this Court held the following in *In re Sanford Fork & Tool Co.*:

> When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.

160 U.S. at 255 (citing *Sibbald v. United States*, 37 U.S. 488, 492 (1838)). *Sanford* is still considered the "seminal case" on the law of the case doctrine and the mandate rule, and this Court as well as each of the circuit courts continue to abide by its stated principles.[4] *United States v. Kellington*, 217 F.3d 1084, 1093 (9th Cir. 2000) (stating that *Sanford* is the "seminal case" on the subject of the mandate rule).

According to *Sanford*, the opinions delivered by this Court are to be consulted to ascertain what was intended in the Court's mandate. *Sanford*, 160 U.S. at 256. As

---

[4] *See, e.g., Quern*, 440 U.S. at 347 n.18 (citing *Sanford*); *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427-28 (1978) (quoting *Sanford*); *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 140 (1940) (declaring that the rule set out in *Sanford* is "familiar" and "indisputable"); *Sprague*, 307 U.S. at 168 (citing *Sanford* and stating that the requirement to carry out a higher court's mandate is "indisputable"); *Eastern Cherokees v. United States*, 225 U.S. 572, 582 (1912) (stating that the courts are bound to give effect to the rule in *Sanford*); *see also United States v. Belculfine*, 527 F.2d 941, 943 (1st Cir. 1975) (citing *Sanford*); *Kerman v. City of New York*, 374 F.3d 93, 110 (2nd Cir. 2004) (citing *Sanford*); *Casey v. Planned Parenthood*, 14 F.3d 848, 857 (3rd Cir. 1994) (stating that the rule in *Sanford* has remained unchanged in nearly one hundred fifty years); *United States v. King*, 1995 U.S. App. LEXIS 28820, *5 (4th Cir. Oct. 16, 1995) (citing *Sanford*); *Tollett v. City of Kemah*, 285 F.3d 357, 364 (5th Cir. 2002) (citing *Sanford*); *United States v. LaSalle*, 1992 U.S. App. LEXIS 32089, *3 (6th Cir. Nov. 24, 1992) (citing *Sanford*); *Hartford Accident & Indem. Co. v. Gulf Ins. Co.*, 837 F.2d 767, 774 (7th Cir. 1988) (quoting *Sanford*); *Bethea v. Levi Strauss & Co.*, 916 F.2d 453, 456 (8th Cir. 1990) (citing *Sanford*); *Estate of Centennial Communications, Inc. v. Vogelei*, 2005 U.S. App. LEXIS 9051, *3 (9th Cir. May 18, 2005) (quoting *Sanford*); *Estate of Leonard E. Whitlock v. Comm'r of Internal Revenue*, 547 F.2d 506, 509-10 (10th Cir. 1976) (citing *Sanford*); *Venn v. St. Paul Fire & Marine Ins. Co.*, 99 F.3d 1058, 1062 (11th Cir. 1996) (citing *Sanford*); *Pastore v. Structure Guard Inc.*, 2003 U.S. App. LEXIS 2352, **3-4 (Fed. Cir. Feb. 5, 2003) (citing *Sanford*).

stated in later decisions, a lower court must act consistently with the "letter and spirit" of the Court's mandate. *See, e.g., Quern*, 440 U.S. at 347 n.18 (discussing that a lower court's actions cannot be inconsistent with either the spirit or the express terms of the Court's mandate); *Kellington*, 217 F.3d at 1093 ("[I]n construing a mandate, the lower court may consider the opinion the mandate purports to enforce as well as the procedural posture and substantive law from which it arises."); *Tollett*, 285 F.3d at 364 (stating that the mandate rule provides that a lower court must implement both the letter and spirit of an appellate court's mandate); *Casey*, 14 F.3d at 863 (stating that the Supreme Court's mandate required the district court to implement both the letter and spirit of the Court's mandate).[5]

In other words, a lower court is to look not only to the express language in the Court's mandate, but also to the Court's intent. The purpose of this rule is to promote the finality and efficiency of the judicial process by "protecting against the agitation of settled issues." *Christianson*, 486 U.S. at 816.[6] Ultimately, the Court in *Sanford* concluded, "It must be remembered . . . that no question, once considered

[5] *See also Rogers v. Hill*, 289 U.S. 582, 587 (1933) (stating that a direction for proceedings in accordance with the Court's "opinion" makes the opinion – as opposed to the "judgment" alone – part of the mandate); *Casey*, 14 F.3d at 859 ("[W]here the appellate court directs the [lower] court to act in accordance with the appellate opinion, . . . the opinion becomes part of the mandate and must be considered with it.") (citation and internal quotation marks omitted).

[6] *See also Christianson*, 486 U.S. at 816 n.5 ("Perpetual litigation of any issue . . . delays, and therefore threatens to deny, justice."); *United States v. Camou*, 184 U.S. 572, 574 (1902) ("[T]here would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions. . . .").

and decided by this court, can be reexamined at any subsequent stage of the same case." *Sanford*, 160 U.S. at 259.

The Seventh Circuit has repeatedly recognized the law of the case doctrine and the mandate rule.[7] Earlier this year, the Circuit stated that the law of the case doctrine and the mandate rule require a lower court to adhere to the commands of this Court. *United States v. White*, 406 F.3d 827, 831 (7th Cir. 2005); *see also Moore v. Anderson*, 222 F.3d 280, 283 (7th Cir. 2000) (acknowledging the Seventh Circuit's reliance on the law of the case doctrine). In fact, the Circuit has held that the *duty* of the inferior courts to enforce the mandates of the Supreme Court is *clear*. *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 532 (7th Cir. 1982). Furthermore, the Circuit has declared that the following arguments are barred by the law of the case doctrine: 1) arguments for reconsideration not based upon intervening authority, new and previously undiscoverable evidence, or other changed circumstances; and 2) considerations of fact or law that were available when the previous appeal was argued. *Vidimos*, 179 F.3d at 1065 (citing, among other case law, *Agostini v. Felton*, 521 U.S. 203, 236 (1997)).

Based upon this long line of prior case law, the Seventh Circuit had a *duty* to follow this Court's mandate strictly, taking both the letter and spirit of the mandate

[7] Yet this is not the first time the Northern District of Illinois and the Seventh Circuit have been implicated in failing to abide by a mandate of this Court. *See Vendo*, 434 U.S. at 425-27 (addressing the district court's failure to vacate an injunction, despite the Supreme Court's prior holding that the injunction be reversed).

into consideration. The Seventh Circuit inexcusably deviated from the Court's mandate.

II. THE SEVENTH CIRCUIT FAILED TO ABIDE BY THE LETTER AND SPIRIT OF THIS COURT'S MANDATE IN *NOW II*

On January 28, 2005, the Seventh Circuit held the following:

> The [Supreme] Court did not have before it, and thus made no ruling on, the question whether four more predicate acts involving "acts or threats of physical violence to any person or property" could support a more narrow injunction.

Denial of Rehearing, 396 F.3d at 811. Thus, the Circuit concluded, the only remaining question was whether a different injunction, tailored to the violations found, would be appropriate. *Id.* at 812. The express terms and the spirit of this Court's mandate in *NOW II* dictate differently.

In *NOW II*, the Court concluded that its determination with respect to extortion under the Hobbs Act violations rendered insufficient "the other bases or predicate acts of racketeering" supporting the jury's conclusion. *NOW II*, 537 U.S. at 397. In other words, all of the predicate actions – including the four predicate acts – were insufficient to support the jury's conclusion. The Court then explicitly held the following:

> Because *all of the predicate acts* supporting the jury's finding of a RICO violation *must be reversed*, the judgment that petitioners violated RICO must also be reversed. Without an underlying RICO violation, the *injunction* issued by the District Court *must necessarily be vacated*. We therefore need not address the second question presented – whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. § 1964.

NOW II, 537 U.S. at 411 (emphasis added). Thus, the express terms of the Court's mandate dictated that *all* of the predicate acts and the *injunction* be *reversed*. Nevertheless, the Seventh Circuit ruled that four predicate acts *remain* and an injunction *may still be maintainable*. This is in direct conflict with the express terms – the "letter" – of this Court's mandate.

In essence, the Seventh Circuit indicated that this Court did not mean "all" when it said "all." Yet a lower court is simply not free to second-guess or disagree with this Court's reasoning or mandate. *See Sanford*, 160 U.S. at 255 (stating that a lower court may not review the Court's mandate even for apparent error). As the Court stated in *Rogers*, if the Court intended to direct a certain action, "it is to be presumed that it would have done so unequivocally and directly by means of language, form of decree and mandate generally employed for that purpose." *Rogers*, 289 U.S. at 587. Here, the Court unequivocally stated "all" and declared that the injunction "must necessarily be vacated." This form of decree and mandate could not be more direct.

Furthermore, the Court's intent – the "spirit" of the mandate – is just as clear and has been equally ignored and contradicted by the Seventh Circuit. This Court acknowledged that it granted certiorari to answer the following questions: 1) whether Petitioners committed extortion within the meaning of the Hobbs Act, and 2) whether Respondents, as private litigants, may obtain

injunctive relief in a civil action pursuant to RICO. *NOW II*, 537 U.S. at 397. The most obvious example of the Court's intent – outside of its unequivocal language – is found in its decision not to address the second question of whether a private plaintiff in a civil RICO action is entitled to injunctive relief. *Id.* If the Court intended the alleged four predicate acts to remain open, it could not have passed on this question, as there would have been an underlying RICO violation. Rather, the Court meant what it said: *no* predicate acts remained, and therefore the question of private injunctions need not be addressed.

In addition, the four predicate acts were indeed within the scope of the questions presented on certiorari. Most telling is the fact that the four predicate acts were included in the injunction the Court reversed. Specifically, the District Court declared that the Defendants were enjoined from directly or indirectly interfering with the Respondents' businesses by "using violence or threat of violence" against any of the Respondents. *District Court Order*, 1999 U.S. Dist. LEXIS 11980, at **60-61. Both this Court as well as the Circuit Court acknowledged that the injunction enjoined such acts or threats of violence. *NOW II*, 537 U.S. at 399 ("[T]he District Court entered a permanent nationwide injunction prohibiting petitioners from . . . using violence or threats of violence. . . ."); *Decision Affirming Judgment*, 267 F.3d at 695, 706 (noting that the District Court entered a nationwide injunction prohibiting the use or threat of violence). In fact, the Circuit Court acknowledged that the purpose of the injunction was to direct Defendants away from using threats and violence. *Decision Affirming Judgment*, 267 F.3d at 707.

As the four predicate acts were explicitly included in the District Court's injunction, and because the injunction

was before the Court on certiorari, it follows that this Court had those predicate acts before it when it reversed the injunction. Thus, the four predicate acts were within the scope of the Court's mandate.

The four predicate acts also fall specifically under the first question presented in *NOW II*. While the Seventh Circuit assumed that the four predicate acts were not before the Court because those acts were not explicitly enumerated in the petitions for certiorari, that assumption is flawed.[8] *Denial of Rehearing*, 396 F.3d at 812; *Initial Order on Remand*, 2004 U.S. App. LEXIS 4020, at **6-9. According to the Circuit's reasoning, neither the state law extortion claims nor the Travel Act claims were before the Court because neither were explicitly enumerated in the Supreme Court's grant of certiorari – but because those claims depended entirely on the Court's resolution of the extortion claims for which the Court had granted certiorari, the Court ruled upon their validity. *See NOW II*, 537 U.S. at 409-11.

Likewise, the four predicate acts were also included within the first question presented.[9] The Court granted certiorari in *NOW II* to answer whether the Petitioners committed extortion within the meaning of the Hobbs Act,

---

[8] Even if this assertion was correct, the Circuit Court ignored the fact that Respondents are not prevailing parties, and a permanent injunction can only issue when a party actually prevails on the merits. *See, e.g., Amoco Prod. Co. v. Vill. of Gambel*, 480 U.S. 531, 546 n.12 (1987) (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 392 (1981)).

[9] *See Denial of Rehearing*, 396 F.3d at 820 (Manion, J., dissenting) ("[T]he four predicate acts of violence to persons or property depend on the viability of the extortion claims in this case. By holding that the [Petitioners] did not commit extortion, it necessarily follows that the four predicate acts also cannot support a RICO verdict.").

and the Respondents have acknowledged that the four predicate acts were based upon the Hobbs Act. *Id.* at 397; *Denial of Rehearing*, 396 F.3d at 818 n.1 (Manion, J., dissenting). When this Court ruled that Petitioners did not commit extortion under the Hobbs Act, it necessarily ruled on those four predicate acts.

Moreover, the parties' arguments before this Court in *NOW II* indicated that the four predicate acts were before the Court. While Respondents did mention in the petition stage that there were four predicate acts independent of extortion, Petitioners countered that argument by stating that they challenged each and every predicate act. *See* Respondents' Brief in Opp. to Petition for Writ at 5, 5 n.14, 15, *NOW II*, 537 U.S. 393 (2003); Petitioner's Reply to Brief in Opp. at 7, 7 n.13, *NOW II*, 537 U.S. 393 (2003). Subsequently, when the parties briefed the merits of the case, Respondents dropped this argument. In fact, in answering the Petitioners' briefs, Respondents specifically referred to 121 RICO predicates – not the 117 now alleged – which necessarily demonstrates that the RICO predicates before the Court included the four predicate acts. *See* Merits Brief of Respondents at 1, 3, 3 n.4, *NOW II*, 537 U.S. 393 (2003). Because the Respondents did not counter Petitioners' claims that all of the predicate acts were before the Court, and because the Respondents apparently included the four predicate acts in the 121 predicates to which they referred, the Court had no reason to explicitly address the four predicate acts now allegedly at issue.

For each of these reasons, the four predicate acts were before the Court and the Court ruled – both in letter and spirit – that the injunction be reversed even as to these four predicate acts. Instead of executing that mandate, the Circuit failed to treat the Court's decision on the four

predicate acts as "finally settled," varied the mandate, examined the mandate for purposes other than execution, and intermeddled with the mandate. *See Sanford*, 160 U.S. at 255. Interestingly, the Seventh Circuit's actions violated its own case law. The Respondents' arguments are not based upon intervening authority, new and previously undiscoverable evidence, or other changed circumstances.[10] *See Vidimos*, 179 F.3d at 1065. Instead, the Circuit considered law and facts which were available when *NOW II* was argued – which is exactly the type of review the Circuit declares barred by the law of the case doctrine. *See id.*

In summary, not only were the four predicate acts before this Court in *NOW II*, but this Court ruled upon those acts and concluded that the injunction prohibiting those acts must be reversed. As such, the Seventh Circuit deviated from both the letter and spirit of this Court's mandate. Therefore, the judgment of the lower court should be summarily reversed.

---

[10] These are exceptions to the law of the case doctrine generally allowed by the federal courts. Neither the Respondents nor the Seventh Circuit contend that any of these exceptions apply.

CONCLUSION

The judgment of the lower court should be summarily reversed.

Respectfully submitted,

CLARKE D. FORSYTHE
(*Counsel of Record*)
DENISE M. BURKE
MAILEE R. SMITH
AMERICANS UNITED FOR LIFE
310 South Peoria Street,
Suite 300
Chicago, Illinois 60607
312/492-7234

G. ROBERT BLAKEY
O'Neill Professor of Law
NOTRE DAME LAW SCHOOL*
326 Law School
P.O. Box R
Notre Dame, Indiana 46556
574/631-5717

Counsel for Amicus Curiae

August 26, 2005

*Noted for purpose of identification only.